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No. 85-1157

In the Supreme Court of the United States

October Term, 1985

HILLTOP REALTY, INC.,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS and
HEIGHTS COMMUNITY CONGRESS,
Respondents.

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported as 774 F.2d 135 and is reprinted at A1 of the Appendix by Petitioner. The Opinion of the United States District Court dated November 30, 1983 is unreported and is reprinted at A49 of the same Appendix. The Opinion of the United States District Court dated April 22, 1984, also unreported, is the Order from which the appeal to the Sixth Circuit was taken. It was omitted from Petitioner's Appendix, but is being submitted by Respondents in order to complete the record necessary for determination of the Petition.

The Respondents would ask that the Order of the United States District Court dated July 23, 1985, relating to the award of attorney fees, and which appears in the Petitioner's Appendix at A19, be stricken from that Appendix on the basis that the Order is currently on appeal to the Sixth Circuit, and is not, therefore, properly before this Court.

STATEMENT OF THE CASE

The City of Cleveland Heights ("City") is a municipal corporation organized and existing under the laws of the State of Ohio. It is surrounded by Cleveland on the west, East Cleveland and Cleveland on the north, South Euclid and University Heights on the east, and Shaker Heights on the south (M.O. 4) (A51). The City is governed by a City Council, which then elects a Mayor and appoints a professional City Manager (M.O. 4) (A51-52).

The Heights Community Congress ("HCC") is a not-for-profit, non-partisan organization organized and operating under the laws of the State of Ohio (M.O. 15) (A60). It is composed of religious, civic, educational, neighborhood, and community organizations in the Cleveland Heights/University Heights area, and it exists for the purpose of promoting and maintaining an open and integrated community (M.O. 16) (A60).

Hilltop Realty, Inc. ("Hilltop"), currently known as HGM/Hilltop, is an Ohio corporation, operating since 1953 as a real estate brokerage firm, with its principal office in Lyndhurst, Ohio (M.O. 25) (A67). At all times relevant herein, Hilltop maintained a real estate office in the City of Cleveland Heights, as well as maintaining offices in the other eastern suburbs of Cleveland (M.O. 25) (A67).

On March 7, 1979, the City and the HCC, together with six individual plaintiffs whose claims had been dismissed prior to trial, brought suit against Hilltop, its president, and five individual sales persons. The Complaint alleged various discriminatory housing practices in violation of the Fair Housing Act, 42 U.S.C. Secs. 3604(a), (c) and (e), and the Civil Rights Act of 1866, 42 U.S.C. Sec. 1982. The suit was based upon numerous varied allegations, including allegations concerning discriminatory showings, comments, advertising practices, and solicitation complaints.

The matter proceeded to trial before the Honorable William K. Thomas, United States District Court for the Northern District of Ohio, Eastern Division. Beginning on January 31, 1983, the trial proceeded for a period of some twelve weeks, the proceedings concluding on May 3, 1983, and the final arguments given on June 20, 1983.

In a 207-page Memorandum and Order ("M.O.") filed on December 7, 1983, the District Court found for Plaintiffs, holding that there were eight violations of Sec. 3604 (a), one violation of 3604(c), and one violation of 3604(e), and a finding that Hilltop had a corporate intent to not obey the Fair Housing Act, as was evidenced by the eight already found, together with four additional violations.

The City and the HCC timely filed a motion to alter and amend, pursuant to Rule 59(e), Fed. R. Civ. P. In an Order filed on May 10, 1984, the District Court amended its previous Order to award one dollar in nominal damages to the HCC, but denied the Plaintiffs' claims for injunctive relief. Memorandum and Order filed April 30, 1984, and consisting of some 33 pages, re-evaluated and made additional findings with regard to the discriminatory contacts.

Hilltop filed an appeal to the United States Court of Appeals, Sixth Circuit, with regard to the merits of the case. The City and the HCC filed an appeal with regard to the District Court's denial of injunctive relief. The Sixth Circuit Court of Appeals, on October 2, 1985, affirmed the District Court's decision in all parts except the District Court's single finding of a violation of Sec. 3604(e), which finding was reversed.

ARGUMENT

I. PLAINTIFFS ESTABLISHED THE ELEMENTS OF STANDING AT EACH STEP IN THE LITIGATION BELOW.

Standing in fair housing cases has been consistently and liberally granted to plaintiffs. Of course, the plaintiff must have suffered a "distinct and palpable" injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). But the injury claimed may be as abstract as a stigmatic one. *Smith v. City of Cleveland Heights, et al.*, 760 F.2d 720 (6th Cir. 1985), *cert. den.* ..... U.S. ..... (January 13, 1986).

The *Havens* case, cited by Petitioner to demonstrate that this Court is imposing greater limitations upon claims of standing, does instead approve an expansion of the definition of standing to include testers as well as *bona fide* homeseekers within the group of those able to make a claim under 42 U.S.C. Sec. 3604. Citing its decision in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) as the standard in fair housing cases, this Court repeated that standing is to extend ". . . to the full limits of Art. III and that the courts accordingly lack the author-

ity to create prudential barriers to standing in suits brought under that section." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), *citing Bellwood*, 441 U.S., at 103, n.9. In *Gladstone*, the Court had found that a municipality and four individuals had standing to sue for injuries alleged to have been caused by real estate steering practices.

In *Havens*, this Court interpreted the "any person" language of 42 U.S.C. Sec. 3604(d) to include a fair housing organization, testers, and individuals suffering indirect injury because of harm to the neighborhoods in which they resided. *Havens*, 455 U.S., at 373-74, 378-79.

There is, then, no need to engage in a lengthy evaluation of non-fair housing law to create a new definition of standing. The District Court's findings and those of the Court of Appeals, Sixth Circuit, are consistent with the long line of standing cases.

Petitioner misrepresents the findings of the District Court as they describe injury to the HCC. The trial court found, and the Sixth Circuit affirmed, that the correlation between the type of discriminatory activity and the resulting harm to the HCC was of such a nature that it caused monetary injury to the HCC. However, the amount of such injury had not been established and could not, therefore, be recovered from Hilltop beyond the nominal damages award (774 F.2d, at 139) (A6).

A. The City's Standing Is Based Upon Both Real And Threatened Injury.

Petitioner's argument that the City created its own injury has no merit. *See*, Petition at p. 7. The District Court found both real and threatened injuries to the City (M.O. 197) (A198). The real injuries, and the trial court's findings about those injuries, were based primarily upon

exhibits and the testimony of City Manager Richard V. Robinson, who described the components of the City's fair housing programs and the dollar costs of each (M.O. 194-197) (A195-198). The District Court concluded that these expenditures ". . . were necessitated by the City's policy to promote a stable integrated community and to ward off the resegregation of its various neighborhoods and the City as a whole." (M.O. 197) (A198).

The District Court also found threatened injuries. Certain areas of the City were found to be resegregating (M.O. 19) (A198). After a thorough analysis of the real estate values in the Eastern suburbs the District Court concluded that the tendency toward resegregation threatens the City's tax base and its school system (M.O. 197-199) (A198-200).

This Court has already linked school segregation to housing segregation. The District Court, before analyzing the City's school data, cited the language from *Bellwood* that links school segregation to housing segregation. 441 U.S., at 111, n.24 (M.O. 199-200) (A199-200). The school system was not a plaintiff, to be sure, so relief was not requested on its behalf. But the census tract demographic findings made by the District Court and the racial figure from the schools underscored the racial isolation occurring within the City's neighborhood school boundaries and further emphasized the harm to the City's policies and programs. *See* (M.O. 199-200) (A199-200).

Hardly to be considered an "investigation," the City's proof and the District Court's findings were that the programs engaged in by the City and by the HCC were to combat the serious harm done to both of them as a result of Defendant's illegal discriminatory acts (M.O. 199-200) (A199-200).

B. The District Court Applied The Correct Standard In Deciding Standing.

Not only has Hilltop mis-described the factual findings of the District Court, but it has also incompletely stated the standing requirements set forth by this Court in *Bellwood*. The complete quotation describes some of the adverse consequences of steering practices upon a neighborhood.

> If petitioners' steering practices significantly reduce the total number of buyers in the Bellwood housing market, prices may be deflected downward. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents.

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979). The Court then lists other injuries, including harm to the school system, and concludes the section on the municipality's standing with the following:

> If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct.

Id., at 111. The plain language requires that a municipality demonstrate only that by reason of Defendant's acts it is losing its racial balance and stability, not that it has become resegregated.

Hilltop also confuses the municipality's standing requirements with those set forth for individuals. *See* Petition at 9. In *Bellwood*, the injuries claimed by the individuals were based upon their residence in an area being trans-

formed from integrated to predominantly black, thereby depriving them of the benefits of living in an integrated society. 441 U.S., at 111. Only an individual claim triggers analysis of the neighborhood size. No such analysis is relevant or required when the claims are presented by an organizational plaintiff alleging harm to the goals and programs of the entire organization.

Hilltop finally attempts to bolster its argument by citing racial figures that do not appear in the District Court's findings, ignoring in the process the actual findings made by the District Court. Neither Hilltop's references to "average annual increase in black population" nor the "county-wide black percentage" has a basis in the District Court's findings. *See* Petition, at 9. The District Court's actual findings about the percentages of increase in minority population during the period from 1970 to 1980 are analyzed in detail according to census tracts. *See* (M.O. 6-10) (A53-56). The District Court concluded that focusing upon the average population figures concealed the higher non-white percentages in some census tracts, and hence the resegregation of certain areas of Cleveland Heights (M.O. 7) (A54).

C. The District Court Properly Found That The HCC Had Standing.

The District Court used the HCC's own statement of purpose as set forth in its Code of Regulations. The HCC exists for the purpose of ". . . promoting and maintaining an open and integrated community of the highest quality." (M.O. 16) (A60).

Again, Hilltop misstates the findings of the District Court relating to the injury claimed. The District Court found that the HCC was unable to connect ". . . Hilltop's

section 3604 violations to HCC's expenditure of monies for monitoring ($4,094) or the more inclusive costs of ($9,522)." (M.O. 200) (A200).

The District Court then considered whether Hilltop had "perceptively impaired' the HCC's ability to carry out its stated purpose (M.O. 202-203) (A201). The standard, derived from *Havens* is that:

> (if), as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury-in-fact.

455 U.S., at 365. Although the HCC's claim for specific dollar damages was not established, the HCC suffered a "general injury" to its programs which was sufficient for it to seek non-monetary relief (M.O. 201-02) (A202).

The Court of Appeals, when addressing the same argument, observed that:

> . . . . [t]he court's ruling on economic injury was not that HCC had suffered no such injury, but that the amount of its expenditures attributable to defendants' violation was too speculative to support a damage award.

774 F.2d 139, n.2 (A6, n.2). The Court of Appeals found that the factual findings upon which standing was based were not "clearly erroneous," that they constituted "something more than an ingenious academic exercise in the conceivable," and that both plaintiffs had ". . . alleged and proven facts sufficient to establish actual or *threatened* injury" as required by *Havens* (emphasis in original) (citations omitted) 774 F.2d 139 (A6-7).

D. This Case Meets The Article III Case Or Controversy Requirement.

Petitioner argues that the orders issued by the District Court amounted to no more than advisory opinions. But a reading of the well-settled definition of the Article III case or controversy requirement makes it apparent that this case and the orders it produced do not fit within the advisory opinion prohibition:

> By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. [The] term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.

Muskrat v. United States, 219 U.S. 346 (1911). A 207-page Memorandum and Order awarding to Plaintiffs a declaratory judgment and finding Defendants liable for having committed ten violations of the Fair Housing Act, supplemented by a 33-page Order awarding the HCC nominal damages, both based upon testimony of nearly 100 witnesses, recorded in 53 volumes of transcript, after a twelve-week trial to the bench, scarcely lacks regularity of proceedings or adverse parties.

Petitioner's argument must fail.

II. THE DISTRICT COURT DEFINED, AND THEN PROPERLY APPLIED, THE STANDARD OF CONTINUING VIOLATION.

Hilltop's argument about the statute of limitations must fail for several reasons. First, the fact that there

was a finding of one violation squarely within the 180-day period renders unnecessary much of the Title VII "continuing violation" standard. Second, the findings of the District Court, relating to the continuing nature of the violations and the relatedness of the discriminatory acts, is an application of the proper standard which should not be re-determined by this Court. Finally, the Title VII case upon which Hilltop places primary reliance is factually and legally irrelevant to this case.

Petitioner ignores both the body of Title VIII law dealing with the statute of limitations and the established standard for determining a continuing violation, and urges this Court to adopt a new standard based, instead, upon Title VII cases.

A. Plaintiffs Met The 180-Day Requirement By Establishing One Violation Within That Period.

To be sure, 42 U.S.C. Sec. 3612(a) contains a 180-day statute of limitations. The District Court properly found that the audit involving Hortense Johnson, an event which was within the 180-day period, constituted discrimination in violation of Sec. 3604(a) (M.O. 82-93) (A111-119). The Court of Appeals for the Sixth Circuit analyzed the Johnson audit carefully as well. 774 F.2d 139 (A8-10). After setting forth the simple *Havens* requirement that a complaint be filed within 180 days of the last asserted occurrence of that practice, the Court of Appeals concluded that:

> [D]efendants' argument that the court erred in holding that the individual violations found satisfied the continuing violation requirement amounts to nothing more than a disagreement with the District Court's view of

> the evidence in its entirety. The Court's finding on this point was not clearly erroneous.

774 F.2d 139 (A10).

It is not necessary, as Petitioner would urge this Court, to look beyond the *Havens* case in determining the appropriate standard to be used. The *Havens* case does not constitute a limitation upon the 180-day prerequisite as Petitioner suggests at page 14, but is, rather an expansion of that period. The sole violation within the 180-day period in *Havens* involved only one individual, Coles, whose claim was the subject of a consent order already entered by the District Court. 455 U.S., at 380. By the time the case reached this Court, there was then no one who stated an individual claim which fell within the 180-day period, yet, standing was granted to the remaining plaintiffs. *Id.*, at 371.

B. The District Court Properly Found That Hilltop Had Engaged In A Continuing Violation Of Title VIII.

Havens involved a pattern or practice claim. *Id.*, at 380-381, n.23. Separate injuries had been done to individual testers, who then used each other's injuries to demonstrate a continuing violation to each of them. *Id.*, at 381.

The HCC and the City had vigorously argued that they had proven a pattern and practice of discrimination by Hilltop. The District Court rejected the Plaintiffs' arguments, concluding from its factual findings that a continuing practice was present (M.O. 197) (A195-196).

C. Hilltop's Reliance Upon Title VII Case Law Is Misplaced.

The Title VII case cited by Hilltop involves a female flight attendant who had worked for United Airlines for a 15-month period between 1966 and 1968. *United Airlines, Inc. v. Evans,* 431 U.S. 553 (1976). At that time, it had been United's policy not to allow female flight attendants to be married. *Id.,* at 554. Although it was later decided, as a result of a case filed by another airline employee, that such required resignations violated Title VII, Evans had not been a party to that suit, nor was she protected under the collective bargaining agreement entered into in 1968 between United and its union, in which reinstatement of certain flight attendants was ordered. 431 U.S., at 555. Evans' only claim was that United engaged in a continuing violation for not giving her seniority rights when she was rehired in 1972. There were no attacks on the "bona fides" of the seniority system, and there was no intentional discrimination. *Id.,* at 558-559. The system, neutral in its operation, did not constitute a continuing violation.

> The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory. But such a challenge to a neutral system may not be predicated on the mere fact that a past event *which has no present legal significance* has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. (emphasis added)

Id., at 560. Clearly, there was no violation that *could have* extended into any 180-day period.

Quite a different situation is presented here. There was one violation of 3604(a) found within the 180-day period (M.O. 188) (A191). There were numerous others, all with present legal significance, and not racially neutral, which occurred prior to the 180-day period (M.O. 188) (A191).

Yet, this case meets the continuing policy requirements. The District Court also found corporate intent to discriminate, a finding based upon events which began in 1976 and continued through the date of filing the Complaint (M.O. 155-160) (A167-170). That finding of corporate policy "to not obey" the Fair Housing Act is sufficient as a continuing violation to meet a challenge even under Hilltop's Title VII definition.

III. THE DISTRICT COURT BOTH APPLIED THE PROPER STANDARD AND ENGAGED IN A DETAILED FACTUAL ANALYSIS IN ORDER TO DETERMINE THAT HILLTOP VIOLATED 42 U.S.C. SECTION 3604.

The District Court began the careful 88-page analysis (occupying 72 pages in the Appendix) of the Section 3604(a) claims by setting forth the appropriate legal standards from the Fifth and Sixth Circuits. Relying upon the Sixth Circuit definition, extracted from *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd and remanded* 547 F.2d 1168 (6th Cir. 1977), the District Court then discussed the effects/intent question common to all employment and housing cases (M.O. 26-27) (A68-69). The District Court imposed upon Plaintiffs the heavier of the two burdens, requiring in each instance that ". . . plaintiffs must show intent to racially steer." (M.O. 27) (A69). Further rounding out its definition, the District Court cited cases from the Sixth and Seventh Cir-

cuits which stand for the proposition that steering need not be successful in order to be proscribed by Sec. 3604(a), and which adopt the reasonable-person standard as the measure of the effect any statements or actions would have, as well (M.O. 27-28) (A69).

After dealing with the issue of vicarious liability, the District Court concluded its initial evaluation of the relevant legal standards with a rejection of the "pattern and practice" standard set forth by Sec. 3613 in favor of the "continuing violation" standard of *Havens*.

Hilltop's argument appears to be that the District Court created a definition apart, somehow, from the statute itself and not relevant to the statutory requirements, applied the definition to the facts, and made its findings without tying the facts to the statute itself.

Hilltop's arguments simply ignore the record. The findings for each audit are detailed and are stated in terms of the statutory and case law language. The Rust/Johnson audit, for example, makes factual findings that numerous houses were available to the white checker (M.O. 90) (A117). No houses were ever shown to the black checker Hortense Johnson, nor were any others (to replace the one owned by a black family in Cleveland Heights and found by the agent to be no longer available) even suggested to Ms. Johnson (M.O. 90) (A117). When compared to the contemporaneous treatment of the white checker, who was shown houses in four communities, the Court concluded:

> [i]t is determined, therefore, that agent Liff denied showing available homes to Mrs. Johnson on the basis of race, a violation of 3604(a). (footnote deleted)

(M.O. 90) (A117).

Yet, Hilltop twice within this section faults the District Court for engaging in "no further analysis" (Petition, at pages 18, 19). Failure to show any homes to the black, while showing many to the white, is analysis enough to show that housing was made unavailable to the black. No more exhaustive analysis of the evidence should be required of a district court than that which was done in this case. Ten pages of the Memorandum and Order were devoted to the facts of the aforementioned Rust/Johnson audit alone.

Petitioner's third argument, although couched in terms of criticism of the standard used, is, in fact, a simple disagreement with the factual conclusions which were drawn first by the District Court and affirmed by the Sixth Circuit.

Finally, it should be noted that Hilltop misstates the number of violations found by the District Court. The Order, the 207th page of the massive Memorandum and Order summarizing the violations, begins with:

> 1. Upon the findings of fact and conclusions of law heretofore made and for the reasons which have been stated, it is determined and declared:
>
> a. Defendant Hilltop Realty, Inc. has engaged in violations of 42 U.S.C. Sec. 3604(a) in the *eight* incidents specified in part II, 7b., pp. 31-114. (emphasis added)

(M.O. 207) (A205).

While it is vital for this Court to have before it accurate statements as to the factual findings made by the District Court, it is apparent that, in Hilltop's third argument, only the factual findings are being contested.

Disagreements as to factual findings are not the stuff upon which Petitions for Certiorari are properly based. Hilltop's third argument must fail.

IV. THE FIRST AMENDMENT ANALYSIS NEED NOT BE REACHED SINCE THE DISTRICT COURT BASED ITS FINDINGS UPON THE TOTAL CIRCUMSTANCES AND DID NOT LIMIT ITSELF TO THE ILLEGAL SPEECH.

The District Court engaged in a thorough analysis of each of the audits involved in the 3604(a) claims. The Court's findings, based upon *all* of the circumstances, are set forth in a section of the Memorandum and Order which exceeds 100 pages. Petitioner extracts only phrases from those circumstances and presents them as if the words alone were the basis for the findings.

A. The Violations Of Sec. 3604(a) Were Not Limited To Mere Discriminatory Statements.

Hilltop has taken seven statements and has argued that they are subject to First Amendment protection. A discussion of the actual findings made by the District Court will demonstrate that no commercial speech analysis needs to be made.

1. Patricia Pap.

The statement cited by Hilltop at page 21 is only one small part of an audit in which the District Court found discriminatory statements and showings to both the black and white checkers. The first comment made to Pap, the white checker, in the Pap/Tufts audit by sales agent Mayfield was an offensive story about a house which had been occupied by a black family and which needed

to be fumigated before the white family could move into it (M.O. 37) (A77). In conjunction with his description of one neighborhood, Mayfield commented that "it was just human nature, that owners prefer selling to whites . . . they sold to whites 80% of the time, and that was the way it should be . . . ." (M.O. 37) (A77). Agent Mayfield stated, when he was showing the Revere Road property to the white checker, that white buyers were much in demand in that neighborhood (M.O. 37) (A77). Upon leaving the Revere home, the agent indicated his own preference for the Englewood area, stating that it would never be as integrated as the Revere neighborhood (M.O. 38) (A77). These comments demonstrated Mayfield's intent to use race as one of the factors in determining appropriate showings for the white checker and in influencing her housing choices (M.O. 39) (A79).

There was also an actual denial of housing to Ms. Pap. Although the computer printouts listed houses on Chagrin, Menlow, and Caledonia, Mayfield told the white tester that she would not be interested in seeing those houses because "[t]hose neighborhoods weren't integrated any more, that they were black, and that even blacks were reluctant to buy in the neighborhood." (M.O. 38-39) (A78). Those houses were never shown to the whites.

The District Court concluded that Mayfield's statements, which diverted the white checkers from considering, or even from seeing, properties in neighborhoods which were no longer integrated, constituted making dwellings unavailable based upon race, in violation of 3604(a) (M.O. 39) (A79). The earlier statements to the white checkers, the District Court found, corroborated "Mr. Mayfield's locational steering with reference to checkers Pap and Kowalski." (M.O. 39) (A79).

2. Cheryl Porter Tufts.

The next phrase cited by Petitioner is one extracted from the second half of the Pap/Tufts audit, which audit is also analyzed in detail by the District Court (M.O. 33-34) (A74-77). The District Court made many findings with regard to this transaction. Some nine days after having asked Mayfield to show her houses in Cleveland Heights and South Euclid, Mayfield called to suggest that they see a house not in either community, but at 175th and South Miles in Cleveland (M.O. 33-34) (A75). The only other house offered to Ms. Tufts was another open house, to which Mayfield invited her after she declined his offer to see the South Miles house (M.O. 34-35) (A75). The second house was located on the Cleveland Heights/East Cleveland border, in two census tracts with black populations of 34.8% and 53.7% in 1980 (M.O. 35) (A76).

Finally, the District Court looked at the comments which had been made to Ms. Tufts, both as to what they revealed about the agent's intent and as to the part the comments played in influencing her housing choices (M.O. 35-36) (A76). After considering the showings, the reluctant service, the comments, and the agent's intent, the District Court concluded:

> These statements of Mr. Mayfield, considered together with the showings, are deemed to have been made by Mr. Mayfield to influence the housing choices of Ms. Tufts. Therefore, it is concluded that in violation of section 3604(a), Mr. Mayfield racially steered Ms. Tufts toward both a predominantly black area outside of Cleveland Heights and to a more integrated area within Cleveland Heights.

(M.O. 36) (A76-77). Petitioner's claim clearly ignores the numerous findings relating to *all* circumstances of that audit.

3. Patricia Pap.

The third finding cited by Hilltop as a separate violation is actually just one more of the remarks made to the white checker, Patricia Pap, in section 1 above and is simply another part of the evidence considered by the District Court in making its findings of discrimination toward Patricia Pap. *See* (M.O. 37-39) (A77-79).

4. Linda Blaser.

With Linda Blaser, Petitioner once again focuses only upon a phrase and ignores findings of discriminatory showings (M.O. 50) (A87). Again, the trial court's analysis is a detailed one. The District Court found that Blaser, a white checker conducting an audit of Hilltop's Cleveland Heights office, was shown houses only outside of Cleveland Heights (M.O. 50) (A86-87). Despite Mayfield's encouragement to look in Cleveland Heights, he showed her homes only in Lyndhurst and drove by a house in South Euclid (M.O. 50) (A87). The District Court concluded that:

> [s]ince he showed her no homes in Cleveland Heights, the encouragement to look in Cleveland Heights was only talk.

(M.O. 50) (A87).

The Court then looked to the comment made by Mayfield. As it was found by the District Court, the complete comment made to the white checker is as follows:

> You probably won't want your kids to go to East Cleveland schools. They are mostly black but some white home buyers are buying there for the lower prices.

(M.O. 50) (A87). The Court concluded that since the area in question is in a part of Cleveland Heights which is contained within the East Cleveland school system,

> . . . the remark, stressing the "mostly black" character of East Cleveland's schools, would tend to disparage living in the portion of the City which comprises the Caledonia school district.

(M.O. 51) (A87). The conclusion of the District Court is set forth next in the Memorandum and Order. Even the conclusion makes reference to both the showings and the remark:

> As a sales agent in the Heights-Hilltop office, Mr. Mayfield's making of this remark and his showing of houses only outside of Cleveland Heights, even though she had asked for the Heights-Hillcrest area, which includes Cleveland Heights, persuades this court that Mr. Mayfield racially steered Mrs. Blaser away from Cleveland Heights in violation of 3604(a).

(M.O. 51) (A87-88).

5. Jerome Emoff.

A fifth Hilltop misrepresentation concerns the comments and the circumstances of the findings made by the District Court as they related to homebuyer Jerome Emoff. *See* (M.O. 99-100) (A124-125). In this situation, the comment was the beginning of the analysis by the District Court. The remark was made about the Forest Hills area while Mr. Emoff and the sales agent Delores Russo were driving through that area. (M.O. 99) (A124). The Court concluded that such a comment to a reasonable homebuyer was an attempt to influence the housing choices on the basis of race and was, hence, a violation of Section 3604(a) (M.O. 100) (A125).

6. Joseph and Mary Calabrese.

The sixth reference by Petitioner is also to a comment made by a Hilltop agent without a discussion about the other discriminatory events surrounding the making of the comment. *See* (M.O. 101-107) (A125-130). After having specifically requested to see houses in Cleveland Heights, no houses meeting the homeseekers' requirements were shown to them in that City (M.O. 102) (A126). Mrs. Calabrese selected some homes from a multiple listing book and asked to see them, but, each time, she was told that the particular house had been sold (M.O. 102-103) (A126-127). The agent, when confronted with the question as to why the Calabreses were not being shown Cleveland Heights, Shaker Heights and University Heights, responded with the question, "[H]ow do you feel about blacks, specifically?" and elaborated on the question (M.O. 102) (A127). Coupled with the agent's adamant refusal to show the City even when directly asked by both of the Calabreses to do so, the District Court concluded that the remark had further demonstrated a violation of Section 3604(a).

> Both the nature of his statement and his failure to show the Calabreses homes in Cleveland Heights that met their specifications establish racial steering in violation of section 3604(a).

(M.O. 106-107) (A130).

7. Howard Gordon and Belita Tisder Gordon.

The final paragraph in subsection 1 of Petitioner's Part IV contains a callous minimization of the remark made to the Gordons and found by the District Court to be a part of the act of discrimination against them. *See*

(M.O. 107-114) (A130-135). The Gordons, a bi-racial couple with five children from Mrs. Gordon's previous marriage, had specifically sought a home in Lyndhurst (M.O. 107) (A130). In direct response to Mrs. Gordon's request, Agent Francis first told a story about violence to a high school child and followed it with comments that Mr. Gordon, a white, would not be welcome to discuss the problems of his black children with school officials (M.O. 108-109) (A130-131).

Petitioner claims that this statement, like the others previously discussed, did not deny ". . . purchasers the opportunity to purchase homes in the area in question." Petition, at p. 22. Mrs. Gordon stated that the comments caused her to be "worried." (M.O. 108) (A131). Agent Francis did not show the Gordons even a single house in Lyndhurst, and their interest in the community understandably cooled (M.O. 108-110) (A131-132).

The District Court included this evidence as part of its findings that Hilltop had corporate intent "to not obey" the Fair Housing Act (M.O. 114) (A135).

B. The District Court's Findings Are Consistent With The Correct Standards Used To Analyze First Amendment Protection Of Commercial Speech.

In order to prevail in a claim that commercial speech is protected by the First Amendment, the party claiming such protection must prevail in the analysis required by *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 447 U.S. 557 (1980). However, before the party seeking protection may invoke the full analysis of *Central Hudson Gas*, he must meet his initial burden of demonstrating that the commercial speech was

neither misleading nor related to unlawful activity. This Court has stated:

> . . . there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity. (citations omitted)

Id., at 563-564.

The Petitioner in the present case asserts that the Supreme Court has never determined what statements constitute steering (Petition, at 20). In addition to ignoring the fact that the Court had looked to all of the circumstances of each episode, of which circumstances the comments were only a part, it ignores the definitions actually applied by the District Court. The District Court relied in part on the definition of steering set forth in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366, n.1 (1982), as follows:

> . . . [a] practice by which real estate brokers and agents pressure and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups.

The District Court further relied on the authority of *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd and remanded* 547 F.2d 1168 (6th Cir. 1977), in which unlawful racial steering was defined as:

> . . . the use of a word or phrase or action by a real estate broker or salesperson which is intended to

> influence the choice of a prospective property buyer on a racial basis.

Zuch, 394 F. Supp., at 1047. Clearly, a "practice," as defined in *Havens*, includes the spoken word as defined in *Zuch*, as well as including the other actions.

The Petitioner, thus, may not invoke the *Central Hudson Gas* analysis because the Petitioner has failed to meet the threshold requirement of that case, stated as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.

447 U.S., at 566.

1. No constitutional protection attaches to speech that is false, misleading, or unlawful.

The Petitioner asserts that commercial speech is illegal only if it is used to promote the purchase of illegal items or the investment in illegal activities. To support this proposition, the Petitioner relies on *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. den.* 455 U.S. 1005 (1982), a case which dealt with a state statute prohibiting advertising that promotes the sale of "drug paraphernalia." A careful reading of *Casbah* reveals that this case stands for the proposition that: "Commercial speech which promotes an illegal activity may be restricted without subjecting the restriction to scrutiny under a balancing test." *Id.*, at 564. It is only outside of the commercial speech context that speech advocating a violation of the law may be proscribed by showing that the speech is directed to inciting or producing imminent lawless action.

cf. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Petitioner has characterized the speech of its agents as commercial. Therefore, the *Brandenburg* test does not apply. Rather, an intermediate level of constitutional scrutiny comes into play, and then only upon a showing that the speech was lawful in the first place.

The Petitioner alleges that the disputed statements and solicitations were made for the purpose of selling homes (Petition, at 21). While statements made for such a purpose are not unlawful under any standard, these self-same statements are unlawful when the purpose is not only to sell a home but to sell a home based on racial considerations in violation of the Fair Housing Act. The District Court, upon a painstaking examination of the evidence, found that the Petitioner had engaged in ten Fair Housing Act violations (A191, n.101). While no determination as to the falsity or misleading character of the Petitioner's statements was made, the District Court did find them to be unlawful. As stated above, unlawful speech is not entitled to the protection of the First Amendment.

2. Even if the Petitioner established that its speech was lawful, the Petitioner cannot succeed under the analysis of Central Hudson Gas.

Once the Petitioner meets his initial burden of showing that his speech is lawful and thus entitled to protection under the First Amendment, the Court will apply the remaining analysis which requires the State to show:

a. a substantial interest to be achieved by restrictions on commercial speech;

b. the limitation on speech is designed to achieve the State's interest; and

c. the limitation is not more extensive than is necessary to achieve the State's interest.

3. The substantial government interest is set forth in Title VIII itself.

Once again, Hilltop has set up a tin man, has misrepresented it to possess a heartbeat, and then has criticized the court for not giving it Cardio Pulmonary Resuscitation. It strains one's credibility to accept the Petitioner's implicit assertion that the Fair Housing Act is not the embodiment of a substantial governmental interest. Asserting without needless argument that the Fair Housing Act is a substantial governmental interest, one need only examine the requirements of the statute to see that the limitations on speech contained therein are designed to achieve the State's interest.

Petitioner's assertion seems to be a dual one: first, a back-door attempt to argue that Section 3604(a) is unconstitutional as it relates to speech; and second, that sales agents are providing a valuable service by frightening customers into making housing choices in same-race neighborhoods.

V. PETITIONER FAILS TO DEMONSTRATE SPECIAL AND IMPORTANT REASONS WHY A WRIT OF CERTIORARI SHOULD ISSUE.

Rule 17, Supreme Court Rules, states that only "special and important" reasons will dictate the granting of a Writ of Certiorari. The resolution of a conflict between or among the federal courts of appeals will require granting a Writ, as will correcting a decision which might conflict with prior holdings of this Court. Rule 17, Supreme Court Rules.

Petitioner does not even allege that the holding of the Sixth Circuit conflicts with those of other federal courts of appeals. Nor does Petitioner cite to applicable earlier holdings of this Court to show an erroneous application by the Sixth Circuit. Petitioner simply argues that the Sixth Circuit was wrong, as the District Court had been earlier.

CONCLUSION

Respondents request this Honorable Court to deny the Petition for a Writ of Certiorari because Petitioner has not identified any special and important reasons why a Writ should issue. The Court of Appeals correctly applied this Court's opinions interpreting both standing requirements and the Fair Housing Act itself, including *Gladstone, Realtors v. Village of Bellwood* and *Havens Realty Corp., et al. v. Coleman, et al.*

Respectfully submitted,

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APPENDIX

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed May 10, 1984)

No. C79-422

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HEIGHTS COMMUNITY CONGRESS, *et al.*,
Plaintiffs,
v.
HILLTOP REALTY, INC., *et al.*,
Defendants.

ORDER

THOMAS, *Senior Judge*

The court, having filed its memorandum and order granting plaintiff Heights Community Congress' (HCC) Rule 59(e) motion to amend and modify judgment to grant HCC One Dollar ($1.00) as nominal damages, and denying the Rule 59(e) motion of plaintiffs HCC and City of Cleveland Heights to amend and modify judgment to grant injunctive relief (prohibitory and affirmative) against defendants Hilltop Realty and Bruce Johanns, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

IT IS ORDERED that the judgment is amended and modified, and One Dollar ($1.00) nominal damages is awarded Heights Community Congress against the defendant Hilltop Realty, Inc.

IT IS FURTHER ORDERED that the Rule 59(e) request of plaintiffs Heights Community Congress and City of Cleveland Heights for amendment and modification of the court's judgment to include injunctive relief (prohibitory and affirmative) against the defendants Hilltop Realty and Bruce Johanns is denied.

Further, IT IS DECLARED that this court's jurisdiction and authority under 28 U.S.C. §2202 is continuing.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Senior Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed April 30, 1984)

No. C79-422

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HEIGHTS COMMUNTY CONGRESS, *et al.*,
Plaintiffs,

v.

HILLTOP REALTY, INC., *et al.*,
Defendants.

MEMORANDUM AND ORDER

THOMAS, *Senior Judge*

In this action, based on the Fair Housing Act, 42 U.S.C. §3601, *et seq.*, plaintiffs Heights Community Congress (HCC) and the City of Cleveland Heights (City) on December 7, 1983, were granted a declaratory judgment against defendants Hilltop Realty and Hilltop agent Bruce Johanns. However, the court concluded that considerations itemized in the "Relief" section of its memorandum and order of November 30, 1983 (hereinafter "opinion") "militate[d] against the issuance of an injunction."

Plaintiffs now move pursuant to Fed.R.Civ.P. 59(e) to "enter an Order granting injunctive and related affirma-

tive equitable relief and further granting to plaintiff Heights Community Congress monetary relief. . . ." Opposing plaintiffs' reconsideration motion, defendants Hilltop and Mr. Johanns assert that "the reasons advanced by plaintiffs do not justify the Court modifying its Order in this case." Subsequently, the court granted the United States' motion to file an amicus curiae brief "in support of the [plaintiffs'] motion . . . to amend the judgment in this case to provide for injunctive relief prohibiting defendant Hilltop Realty from engaging in future unlawful conduct." The government stated, "we take no position concerning the appropriateness of ordering equitable relief beyond a prohibitory injunction."

Should the court determine on reconsideration that the plaintiffs are entitled to injunctive relief, the court is empowered under Fed.R.Civ.P. 59(e) "to alter or amend the judgment."[1] In part I the court sketches the background against which the motion need be considered and then takes up the request of Heights Community Congress (HCC) that nominal damages be awarded HCC. Other alteration motion claims are considered in subsequent parts.

I.

In the section of the opinion entitled "Section 3604 (a): Summary and Conclusions," pp. 155-160, with respect to eight identified incidents this court determined and declared that Hilltop engaged in violations of section

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1. In cases tried with or without a jury, Rule 59(e) authorizes a court to alter or amend the judgment when a motion is "served not later than 10 days after entry of judgment." Referring to such a motion, *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982), observes that "[t]he grant or denial of a Rule 59(e) motion is within the informed discretion of the district court, reversible only for abuse."

3604(a). This section prohibits "making unavailable a dwelling because of race."[2] With reference to agent Johanns' postcard solicitations of sales in August and November 1978 the court also determined and declared that defendants Hilltop and Johanns violated section 3604(e). This subsection prohibits solicitation of housing sales based on race.

In *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974) (first appeal), 545 F.2d 554 (6th Cir. 1976) (second appeal), the Marrs, a black couple, charged that based on race four defendants refused to sell a house, in violation of the Fair Housing Act. Five days later the house was sold to the Marrs. The district court found a fair housing violation against Arntz, one of four defendants. An agent of Rife Realty Agency, Arntz misrepresented that the house was unavailable. The district court refused to find Rife and the other two defendants responsible. Finding error, the court of appeals concluded that Rife, the broker, was liable for the acts of Arntz, the sales agent.

Applying *Marr v. Rife*, 503 F.2d at 742, this court imputed to defendant Hilltop the acts or statements of Hilltop's agents in the eight section 3604(a) violations, (agent Mayfield in four violations and four other agents in the remaining four violations). These violations were found to have impacted on Cleveland Heights, causing distinct and palpable injury and threating further injury to the City. Further applying *Marr v. Rife*, it was determined that Bruce Johanns' acts as a Hilltop sales agent in violating section 3604(e) were imputed to Hilltop. The court

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2. The court found that one of the section 3604(a) violations was also a section 3604(c) violation. That section makes it illegal to make statements "with respect of the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race. . . ."

found that there was no evidence that any homeowner contacted Bruce Johanns to put up a house for sale. Nevertheless, the court found that since the City "expended money to enforce the City's anti-solicitation ordinance against him, Bruce Johanns' violation of the ordinance caused a distinct and palpable injury to the City."

The findings relating to HCC are considered in conjunction with plaintiff HCC's assertion that it "is entitled to the recovery of at least nominal damages" as relief from the denial of fair housing rights by defendant Hilltop. Hilltop opposes the request stating there is "no authority which holds that organizations are entitled to nominal damages in fair housing cases."

Section 812 of the Fair Housing Act, 42 U.S.C. § 3612 entitled "Enforcement by private persons," states in part:

> (c) The court may grant as relief, as it deems appropriate, . . . and may award to the plaintiff actual damages and not more than $1,000 punitive damages.
>
> . . .

In the court's opinion, HCC was denied "monetary damages," i.e. "actual" damages, because HCC failed to establish that expenditures in carrying on its various activities to maintain an open and integrated community "were directly caused by violations of the Fair Housing Act by either defendant Hilltop or the other defendants." In this analysis of whether "actual" damages had been proved, this court did not address HCC's entitlement to nominal damages.

In plaintiffs' second appeal in *Marr v. Rife*, the Sixth Circuit upheld the trial court's "determination of minimal compensatory damages" as "not clearly erroneous." 545 F.2d at 555. The court of appeals agreed with the district

court that "plaintiffs' tender of evidence to prove resulting damages from the misrepresentation was speculative." *Id.* While not characterizing the affirmed $1 compensatory damages as nominal damages, it is plain that the court of appeals has thus approved nominal damages in a fair housing action when resulting "actual damages" are speculative and unproved. Clearly, the district court's finding of damages, affirmed by the court of appeals, meets the definition of nominal damages. Nominal damages are defined in 22 Am Jur 2d, Damages § 5, at 20 (1965), as "either those damages recoverable where a legal right is to be vindicated against an invasion that has produced no actual present loss of any kind or where, from the nature of the case, some compensable injury has been shown but the amount of the injury has not been proved."

Jordan v. Dellway Villa of Tennessee Ltd., 661 F.2d 588 (6th Cir. 1981), relied on by the plaintiffs, noted that under *Carey v. Piphus*, 435 U.S. 247, 266 (1978), when "actual damages are not present, the victims of due process violations are still entitled to nominal recovery." In an action brought for a class of tenant applicants for suites in an apartment complex the district court found that the defendant owners and managers violated the Fair Housing Act and 42 U.S.C. § 1982. Also, the court specified a class of persons who were injured by the violation. The court of appeals ruled that the district court too narrowly limited the class of those entitled to recovery. Recognizing that it was essential to show that "race played a role in the rejection of applications filed by the individual claimants," the court of appeals concluded that the test applied by the district court was "irrelevant." The court of appeals held that "[t]he critical issue in determining eligibility for recovery of damages in this case

[and nominal damages were approved] is whether an individual applicant was actually discriminated against by the defendants, not whether an individual applicant would have been able to rent an apartment at Dellway Villa if all applications had been processed fairly." Thus, this Sixth Circuit case upholds the entitlement of individuals to nominal damages in a fair housing case, but, as defendants note, the case does not deal with an organization's claim of damages in such a setting.

Because HCC expended funds necessary to finance monitoring activities to carry out its policy of maintaining Cleveland Heights as an open and integrated community, this court found that HCC suffered a type of general injury, "sufficient to permit HCC to join with Cleveland Heights in seeking injunctive relief or declaratory relief." This general injury represents an invasion of HCC's legal right to engage in its open housing monitoring activities. Its expenditure of funds to maintain these activities constitutes a nexus to race which brings HCC's general injury and claim for nominal damages within the proscriptions of the Fair Housing Act. Allowance of nominal damages to HCC comports with the principle that "[t]he law infers some damage from . . . the invasion of a right", and that "every injury from its very nature legally imports damage." 22 AmJur 2d, Damages § 5, at 20. Hence it is determined that $1, as nominal damages, should be and is awarded to HCC.[3]

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3. Note 109 of the court's opinion observed that "[w]hatever claims for damages under the Fair Housing Act an organization may have are governed by *Havens Realty Corp.* [*v. Coleman*], 441 U.S. 378, 379." Applying *Havens*, this court determined that HCC suffered "general injury," and it is now decided that for this "general injury" HCC is entitled to be awarded $1 in nominal damages.

II.

A.

Plaintiffs argue that "Hilltop's corporate intent not to obey the Fair Housing Act compels the need for a permanent injunction and appropriate limited affirmative relief." Plaintiffs refer to this court's findings that "[t]he eight incidents of making a dwelling unavailable because of race, committed by Hilltop agents, were not isolated incidents" and that their occurrence in "successive years of 1976, 1977 and 1978 demonstrate, as found in II D, a corporate intent to continue to violate section 3604(a)." Particularizing this finding, this court stated:

> That corporate intent involves the corporation's 1977 knowledge of racial statements which John Mayfield made in 1976 and for which he was neither reprimanded nor warned by management. That corporate knowledge paralleled in time John Mayfield's four acts of racial steering during the years of 1976, 1977 and 1978.

In "Section 3604(a): Summary and Conclusions," this court ruled that "the findings of these eight violations are determined to constitute *prima facie* evidence of Hilltop Realty's continuing practice of making a dwelling unavailable because of race" and that the four instances of homeowner witnesses in which the conduct of Hilltop agents showed no violations of section 3604(a) did not rebut the *prima facie* proof. Hence, the court found that defendant Hilltop engaged in eight violations of section 3604(a) and that these eight violations constituted a continuing violation of section 3604(a).

The finding that the eight incidents of section 3604(a) violations "were not isolated incidents" rested principally

on John Mayfield's "four acts of racial steering during the years of 1976, 1977 and 1978" and corporate knowledge of racial statements which John Mayfield made in 1976 which paralleled these four acts of racial steering. These findings supported and justified the court's conclusion that the eight violations constituted "a continuing violation of section 3604(a) 'manifested in a number of incidents.' *Havens*, 455 U.S. 381." Without the four violations of John Mayfield in the years 1976, 1977 and 1978, there would have been no basis for the court's determination of "a continuing violation." Consequently, in applying the 180-day limitations period of section 3612(a), John Mayfield's four violations saved a dismissal of seven of the eight incidents. Only the B(10) Johnson-Liff steering incident would have survived section 3612(a)'s statute of limitations.

When the court took up the subject of "Relief" in part VI of the opinion, a material factor in denying injunctive relief related to the departure of John Mayfield from the company. There, it was observed:

> Notably, John Mayfield, whose conduct was found to constitute racial steering in four of the incidents, left the company in early 1979 before this action was filed.

In addition, the court noted that "[o]ther agents who were involved in some of the incidents, are no longer with the company." Indeed, agent Elayne Liff, no longer with the company, was the agent whose failure to show "available homes to Mrs. Johnson on the basis of race, a violation of section 3604(a)," constituted the single incident that occurred within the 180-day limitations period. The court's original findings relating to the eight incidents, as here amplified, do not show, as the plaintiffs were required to prove, that Hilltop is likely to continue to violate section 3604(a) in the future.

B.

The United States notes that it was "previously engaged in litigation with Hilltop involving allegations of discriminatory conduct similar to those at issue in the present case, *United States v. Exclusive Multiple Exchange, et al.*, civil action No. C70-969," and that a consent decree was entered therein on October 26, 1973. In a pre-trial order, this court excluded "evidence of alleged violations of the 1973-76 consent decree" (see note 1, opinion at page 2). Nevertheless, the court takes judicial notice that, among other things, the consent decree contained a denial by the 12 defendant real estate companies (including Hilltop) that they had violated "provisions of any federal law." The parties agreed to settle the case through the entry of the consent order, in which the 12 defendants were permanently enjoined, among other things, from "denying or otherwise making any dwelling unavailable to any person on account of race, color, religion or national origin." The United States notes that "the practices found by the Court to violate the Fair Housing Act commenced at least as early as August 1976, two months before our consent decree terminated."

Since each defendant real estate company denied that it had violated any federal law, the execution of the consent decree does not constitute evidence that Hilltop had historically discriminated by "making any dwelling unavailable to any person on account of race [or] color." It is correct that during the three year life of the consent injunction John Mayfield committed the August, 1976, Section 3604(a) violations (the Pap-Tufts audits). Apparently neither HCC nor the United States brought these incidents to the attention of the judge who entered the consent injunction and he made no findings with reference to these matters. Hence, no inference of historic discrim-

ination by Hilltop may be drawn from the occurrence of these two incidents during the life of the consent injunction.

C.

In its opinion, at p. 194, the court determined that "Hilltop's section 3604(a) continuing violation and its section 3604(e) violation . . . have caused distinct and palpable injury and has threatened further injury to the City." Each of the eight identified incidents, opinion at pp. 155-160 (herein also called racial steering or steering), involved the showing of dwellings in the City of Cleveland Heights. Because the plaintiffs in this suit are the City of Cleveland Heights and the Heights Community Congress it was decided that this territorial limitation was essential in determining liability. But in reconsidering the plaintiffs' request that this court order injunctive relief, that limitation of territory need not apply.

By now asserting that the court found "12 intentional acts of racial steering," plaintiffs are saying, in effect, that in determining whether Hilltop is likely to violate the Fair Housing Act in the future, the court should consider every incident of racial steering committed by a Hilltop sales agent without respect to whether the incident involved property in Cleveland Heights or in some other community. The United States similarly contends that in "considering whether to grant an injunction, this court has artificially restricted the evidence of violations to those affecting Cleveland Heights alone, although the company does business in other parts of Cleveland's eastern suburbs as well." There is merit in these contentions. Therefore, in reconsidering whether this court's judgment should be altered to incorporate injunctive relief, the court is considering all incidents of steering or non-steering

involving Hilltop sales agents that have been the subject of evidence received at trial.

In its reconsideration of its denial of injunctive relief, widened to all instances of steering or non-steering in the evidence, the counting of these incidents necessarily differs from the court's previous computation of the number of incidents in the opinion (pp. 159 and 205). The court adheres to the findings and conclusions throughout its opinion, reserving only as to those findings and conclusions which relate to the final issue of "relief."

The court herewith presents in tabular form steering and non-steering incidents as found in the evidence. The table includes the experiences of 24 checkers and four homebuyers introduced by plaintiffs. It also includes the experiences of four homeowner witnesses called by the defendants, determined at pp. 146-155 of the opinion not to be steering incidents. Not included on the chart are the experiences of the other homeowner witnesses called by the defendants. They are considered for any effect on the injunctive relief issue in part II D, *infra*.

Opinion Section	Checker or Prospective Homeowner	Agent	Steering	No Steering
II.B.(1)	Spagnolo	Weir		X
B.(1)	Kuzma	Weir		X
B.(2)	Tufts	Mayfield	X	
B.(2)	Pap-Kowaleski	Mayfield	X	
B.(3)	McGee	Mayfield	X	
B.(3)	Butterfield	Mayfield	X	
B.(4)	Embry	Howard		X
B.(4)	Caron	Howard-Mayfield		X

B.(5)	Perry	Williams		X
B.(5)	Blaser	Mayfield	X	
B.(6)	Blaser	Costello		X
B.(6)	Perry	Weir	X	
B.(7)	Bartoo	Hott		X
B.(7)	Drake	Gilmore		X
B.(8)	Newsom	Lee	X	
B.(8)	Horrigan	Mayfield		X
B.(9)	Jones	Gardner		X
B.(9)	Radgowski	Gardner		X
B.(10)	Rust	Gardner-Booher		X
B.(10)	Johnson	Liff	X	
B.(11)	Riggs	Bernstein		X
B.(11)	Butterfield	Bernstein		X
B.(12)	Emoff	Russo	X	
B.(13)	Calabrese	Abbott	X	
B.(14)	Gordons	Francis	X	
D.(1)	Davis	Strithof	X	
D.(1)	Wayman	Fee		X
D.(1)	Clark	Strithof	X	
E.	Raitz	Russo		X
E.	Young	Hott		X
E.	Robinson	Fallon		X
E.	Markon	Seith		X

The chart reflects 13 steering incidents and 19 no steering incidents. Fourteen different agents were involved in the 19 incidents of no steering. Eight steering incidents, four of which involved agent Mayfield, have been discussed *supra* at pp. 7-9 [A9-A10]. Of the five additional steering incidents, one involved agent Mayfield, one involved agent Leo Lee, one involved agent Steven Paul Francis, and two involved agent Angela Strithof. As seen,

agent Mayfield has not been with Hilltop since 1979, and agent Leo Lee left Hilltop in 1982.[4]

By a remark to prospective home buyers Belita and Howard Gordon; an interracial couple, agent Steven Paul Francis was found to have racially steered the Gordons away from Lyndhurst. However, the court further found that he showed the Gordons 45 to 60 homes in several communities, including South Euclid, the location of the Miramar Boulevard home they contracted to buy; and that these showings refuted any claim that Mr. Francis attempted to steer the Gordons into Cleveland Heights. Further findings were made with reference to Mr. Francis in his dealings with homeowner witnesses who were called by the defendants. As detailed in the opinion at 151 n. 78, Mr. Francis showed homes to Mr. Hall "all over Cleveland Heights." When Mrs. Hall asked whether the neighborhood was racially integrated, he "arranged for the Halls to meet their immediate neighbors, a biracial couple."

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4. Plaintiff cites *Harrison v. Otto G. Heinzeroth Mortgage Co.*, 430 F.Supp 893 (N.D.Oh. 1977), to support the proposition that injunctive relief is appropriate in this case against Hilltop. In prescribing a remedy for two Fair Housing Act violations committed by an employee and imputed to the employer company, the court in *Heinzeroth* stated:

> [A]s a whole it seems to the court that since the defendant Haugh has left the employ of the other defendants, there is no need for a prohibitory injunction as prayed for against them. The evidence is clear that they never did any of the things complained of, except vicariously through Haugh's actions. However, a prohibitory injunction will be granted as prayed for against the defendant Haugh.

Id. at 897. Plaintiffs improperly read this case to support this court issuing an injunction against the company. In the present case, Hilltop agents responsible for five of the eight steering violations and two of the five steering incidents found not to be violations, are no longer with Hilltop. Though all of the offenders have not left Hilltop as in *Heinzeroth*, the principal offender and other offenders are gone. It has been explained why the conduct of those offenders who remain do not warrant injunctive relief.

When prospective homeowner Hoffer asked about the racial stability of the Berkeley Road neighborhood, Mr. Francis described the area as a "stable, integrated area." Considering Mr. Francis' conduct with respect not only to the Gordons, but towards Mr. and Mrs. Hall, Mr. Hoffer and Mr. Peko, the three prospective homeowners who bought in Cleveland Heights through him, it is concluded that it is not likely that he would engage in further activity in violation of section 3604(a).

In reconsidering the injunctive relief issue, the court also includes the two steering incidents involving agent Strithof of the Euclid office of Hilltop. These occurred in June 1978. There is no evidence of activity of Mrs. Strithof since that time. Hence, there is no basis on which to decide whether or not agent Strithof is likely to engage in further steering incidents.

D.

In the court's findings, only the experiences of four of the twenty-two homeowner witnesses called by the defendants were used in determining whether the eight violations of section 3604(a), proved by the plaintiffs, were rebutted. However, in this reconsideration of the question of injunctive relief the court is considering all incidents of steering or non-steering involving a Hilltop sales agent that have been the subject of evidence received at trial. Hence the experiences of the remaining homeowner witnesses are relevant.[5] This broader perspective helps the

5. At p. 14 [A15-A16], *supra*, the court has discussed three homeowner witnesses called by the defendants who bought homes through agent Francis, i.e. Hall, Hoffer and Peko. These homeowners are not further identified or discussed in this section. In the chart, *supra* at 12 [A13-A14], the court included the ex-

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court determine "the character of past violations" and whether it is Hilltop's "bona fide intention . . . to presently comply with the law," both important factors to consider in determining whether an injunction should be issued. *United States v. Warwick Mobile Homes Estates*, 558 F.2d 194, 197 (4th Cir. 1977). The court now considers 16 instances relating to these homeowner witnesses.

Agent Mayfield, who was found to have steered on five occasions, sold homes to defendants' homeowner witnesses Sterling, Von Sehrwald and Mays. Mr. Mays, a black, and Mr. Von Sehrwald, a white, both asked for and were shown homes in Cleveland Heights. Both bought in Cleveland Heights. Mr. Sterling, a black, also requested to be shown homes in Cleveland Heights. However, since he wanted a split level home, Mr. Mayfield suggested that Mr. Sterling look in less integrated Lyndhurst where there were many more split levels. Mr. Sterling refused to be shown Lyndhurst, and eventually bought in Cleveland Heights. Mr. Mayfield's effort to show a black buyer a home in a predominantly white community though the latter asked for a more integrated community does not exculpate the former's previously determined acts of racial steering. But Mr. Mayfield's act of not steering black prospective home owners Sterling, Von Sehrwald and Mays, and his non-steering of two of plaintiffs' checkers shown in the chart, are included with all other acts of Hilltop agents disclosed in the evidence in reconsidering the likelihood of Hilltop engaging in future violations of the Fair Housing Act.

Footnote continued—

periences of four other homeowner witnesses (Raitz, Young, Robinson and Markon) referred to at 146-155 of the opinion. Except for Raitz, discussed *infra* at 17 [A18], these four homeowners are not mentioned hereafter in this section. Thus, this section considers the experiences of 16 of the 22 homeowner witnesses called by the plaintiffs.

Delores Russo was also one of the five agents involved in the eight incidents discussed *supra* at 8 [A7-A8]. In its opinion, the court found that agent Russo violated section 3604(a) when she attempted to influence the housing choice of white prospective homebuyer Emoff, plaintiffs' witness, by telling him that an area in Cleveland Heights was more than one half black. Contemporaneously with this incident, agent Russo showed homes to defendants' white homeowner witness Ruth M. Raitz. In its opinion, this court found that agent Russo "suggested Cleveland Heights to Ms. Raitz" and picked out two homes in Cleveland Heights, one of which Ms. Raitz purchased. Agent Russo told Ms. Raitz that Cleveland Heights might have property that Ms. Raitz "would be able to better afford . . . and might have more of the things [she] wanted." These findings along with her showing white homeowner witness Dorothy Landis homes in Cleveland Heights indicate the unlikelihood that agent Russo had any aversion to Cleveland Heights that would cause her in the future to steer prospective white buyers from Cleveland Heights.

Agent Leo Lee, who was found to have steered black checker Newsom into a predominantly black area of Beachwood, sold a Cleveland Heights home to white homebuyer Gerald Artl in May, 1977. Mr. Artl had requested Cleveland Heights, University Heights and South Euclid. Agent Lee showed Mr. Artl homes first in well integrated Cleveland Heights. The home Mr. Artl bought was situated between the homes of a black family and a white family. This instance, devoid of racial steering, is included in the totality of acts of Hilltop agents in reconsidering the injunctive relief issue.

Hilltop agent Evelyn Gardner sold homes to homeowner witnesses Ella Mae Harris (a black) and Ellis Mas-

careno (a hispanic). Ms. Harris contacted agent Gardner in 1981 without any predisposition except to see homes in the eastern suburbs. Ms. Gardner showed her homes in areas such as South Euclid and Richmond Heights, predominantly white areas. Ms. Harris bought a home in South Euclid. Consistent with her conduct in the three incidents introduced into evidence by plaintiffs, agent Gardner did not engage in steering Ms. Harris.[6] This black homeowner's experience with a Hilltop agent was not deemed relevant to the liability issue because it occurred in June, 1981, after the suit was filed. Nevertheless it is included in the evidence bearing on the injunctive issue since it is evidence of Hilltop's present intention to comply with the Fair Housing Act.

In the remaining eight instances, between 1976 and 1979, homeowners bought homes from agents whose conduct was not put at issue by plaintiffs evidence. All eight instances showed no racial steering and are considered in the totality of the evidence. White homebuyers Deborah Bruhn and Terrence Smith were serviced by Marie McManus and LaDonna Herschelman, respectively. They both asked to see and were shown Cleveland Heights and South Euclid and both bought in Cleveland Heights. White homebuyer Estelle Painter bought in Cleveland Heights. Agent Rhoda Burger showed her homes there pursuant to her request. White homebuyer Connie Dustman requested that Bobbi Tortorici show her Cleveland Heights homes, one of which she bought. White home-

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6. Unlike Ms. Harris who had no predisposition for a particular community, Mr. Mascareno asked Ms. Gardner to show him homes in Richmond Heights, South Euclid and Lyndhurst. In early 1977 he bought a home in South Euclid shown by agent Gardner. Agent Gardner's treatment of hispanic Mr. Mascareno was the same as her treatment of black and white prospective homeowners.

buyer David Grieshammer specifically requested an integrated neighborhood. Agent Sherrill showed and sold him a house in Cleveland Heights. Agent Edith Goodman concentrated her search on Shaker and Cleveland Heights for white homebuyer Carter Strang even though he also requested the less integrated South Euclid. He bought in Cleveland Heights. Black homeowner Rosa Peterson was shown homes in Cleveland Heights by Edith Drazin as requested. She bought there. Black homeowner Daniel Brinson was sold a home in Bedford Heights in 1976 and a home in predominantly white Solon in 1979. Both homes were sold to him by agent Esther Congress. In both instances he requested those areas. In sum, steering was not shown in any of the instances described by defendants' homeowner witnesses.

E.

The United States refers to incidents in which this court had found that "there was no racial steering involving Cleveland Heights." The United States argues that "[s]ince most of these incidents were contemporaneous with the incidents on which the Court based its findings of a 'continuing violation' by Hilltop, we do not believe that they support the conclusion that Hilltop is unlikely to violate the law in the future." In its reconsideration of the injunctive relief issue the court has not stopped with a review of the eight steering violations which affected Cleveland Heights. It has also considered five other steering incidents committed by agents Mayfield, Lee, Francis, and Strithof. But that is not the total Hilltop picture revealed in the evidence. Hilltop had 150 agents in 1978 and 160 to 165 in 1979. In attempting to predict the future conduct of a corporation consisting of that many agents, it is deemed relevant to consider not

only the acts of steering but the non-steering acts of all agents whose activities are reported in the record. A predictive factor is that in the years 1976 through 1978, as shown in the chart, *supra* at 12-13 [A13-A14], 14 agents engaged in 19 incidents in which no acts of steering were committed. Further, in assessing the future conduct of the corporation, it is relevant to consider the acts of agents in dealing with defendants' homeowner witnesses, in which no steering occurred. These acts of non-steering involved ten agents not the subject of plaintiffs' evidence, and agents Mayfield, Lee and Gardner, whose conduct has been individually evaluated in part II D.

Considering the acts of all these Hilltop agents, it is concluded that the plaintiffs have not proved that Hilltop is likely to continue steering violations of the Fair Housing Act in the future. Since the solicitation violation found to have been committed by agent Johanns is the only solicitation violation found to have been committed by a Hilltop agent, it is also concluded that the plaintiffs have not shown that Hilltop is likely to repeat solicitation violations in the future.

Upon the reasons and grounds stated, and after due reconsideration, the court reaffirms its conclusion that the plaintiffs have not established a basis upon which this court should at this time grant injunctive relief.[7]

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7. A factor which the court considered in originally denying the request for injunctive relief was the closing of the Heights office for economic reasons and the drop in Hilltop's market share of Cleveland Heights real estate from 12 percent in 1978-79 to 3 1/2 percent in 1982. An affidavit of a Cleveland Heights statistical analyst, Ms. Mervine, states that her analysis shows that Hilltop Realtors "sold approximately nine percent (9%) of the owner-occupied homes sold in Cleveland Hights" during 1982. No explanation is made why plaintiffs did not

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III.

The United States argues that "a mere declaration of law, as applied to Hilltop's conduct here, will provide the defendant with little more than a reminder of what it knew or should have known when it commenced its intentional violations as found by this court." It therefore argues that "[s]uch a remedy is inadequate under these circumstances." Entitlement to injunctive relief depends not on the alleged inadequacy of a remedy of declaratory judgment, but rather upon a finding "that there exists some cognizable danger of recurrent violations." *United States v. Warwick Mobile Homes Estates*, 558 F.2d at 197. One important aspect of declaratory relief, here relevant, should not be ignored. 28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice in hearing, against any adverse party whose rights have been determined by such judgment.

Edward B. Marks M. Corp. v. Charles K. Harris M. P. Co., 255 F.2d 518 (2nd Cir. 1958), gives this section its full force. Referring to section 2202's language, the court stated:

> We take this to mean that the further relief sought—here monetary recompense—need not have been demanded, or even proved, in the original action for declaratory relief. The section authorized further or new relief based on the declaratory judgment, and

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Footnote continued—

attempt to call this witness at the 1983 trial to rebut the 3 1/2 percent estimate of Hilltop's market share in 1982. For this reason and because the court has reconsidered the plaintiffs' request for injunctive relief without regard to Hilltop's present market share of the Cleveland Heights real estate market, the court does not receive the affidavit into evidence.

any additional facts which might be necessary to support such relief can be proved on the hearing provided in the section or in an ancillary proceeding if that is necessary. *Accord, see Alcoa Steamship Co. v. Velez,* 285 F.Supp. 123, 124 (D.C. Puerto Rico 1968); *Shumaker v. Utex Exploration Co.,* 157 F.Supp. 68, 77 (D.C. Utah 1957).

In its opinion, at 206, this court cited *United States v. Hunter,* 459 F.2d 205 (4th Cir. 1972), and in note 110 called attention to note 19 of *Hunter* as it bore on the applicability of declaratory relief in a fair housing case. Additionally, note 19 indicates that section 2202 was available in that case in the future:

> Furthermore, after the entry of a declaratory judgment, 28 U.S.C. § 2202 allows the application for additional relief (including coercive relief) based upon the declarations previously made.

Should the defendants engage in further conduct which constitutes a violation of the Fair Housing Act and the plaintiffs file a supplemental claim to that effect, this court, pursuant to section 2202, is obliged to entertain and determine whether that has occurred. If established, there would then be a predicate for injunctive relief. Should the defendants hereafter commit one or more Fair Housing Act violations, Hilltop would have established, by its own deeds, that it does not intend "to abandon its discriminatory activities or . . . in any way revise its procedures to assure that they will not recur." (Brief of United States at p. 11.)

Upon the entire record, the motion of plaintiffs to alter or amend this court's judgment of December 7, 1983 is denied.[8]

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Senior Judge

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8. In its reply brief, the City states that it "would welcome a hearing at which Ms. Mervine and other witnesses could present evidence of the proper relief to be fashioned." Mr. Friedman's argument for affirmative relief in his summation was interrupted by the court, stating:

> I would suggest that we deal with liability. If I should arrive at a decision favorable to the Plaintiffs, there will be time enough to talk about what types of relief would be considered.

However, since the court ultimately determined that declaratory but not injunctive relief was appropriate any need to "talk" about the "types of relief", i.e. prohibitory injunctive relief alone or that coupled with mandatory (affirmative) relief, was mooted. Moreover, to rule on plaintiffs' Rule 59(e) motion an evidentiary hearing was unnecessary.